No. 22-15827

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FELLOWSHIP OF CHRISTIAN ATHLETES, AN OKLAHOMA CORPORATION, ET AL.,
Plaintiffs-Appellants,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.,
Defendants-Appellees.

On Appeal from United States District Court
for the Northern District of California
Case No. 4:20-cv-02798-HSG
The Honorable Haywood S. Gilliam, Jr.

BRIEF OF *AMICI CURIAE* CARDINAL NEWMAN SOCIETY AND CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS IN SUPPORT OF PLAINTIFFS-APPELLANTS

JOSEPH R. ROSE
GIBSON, DUNN & CRUTCHER LLP
555 MISSION STREET, SUITE 3000
SAN FRANCISCO, CA 94105-0921
(415) 393-8200
JROSE@GIBSONDUNN.COM

BLAINE H. EVANSON
GIBSON, DUNN & CRUTCHER LLP
3161 MICHELSON DRIVE
IRVINE, CA 92612-4412
(949) 451-3800
BEVANSON@GIBSONDUNN.COM

JUN NAM
GIBSON, DUNN & CRUTCHER LLP
333 SOUTH GRAND AVENUE
LOS ANGELES, CA 90071-3197
(213) 229-7000
JNAM@GIBSONDUNN.COM

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each *amicus* hereby certifies that it has no parent corporation, and that no publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

INTEREST OF *AMICI CURIAE*

The Cardinal Newman Society is a nonprofit religious organization whose mission is to promote and defend Catholic education. Among other things, the Society advocates and supports fidelity to the teaching of the Catholic Church across all levels and methods of Catholic education, and identifies and promotes clear standards of Catholic identity and best practices in Catholic education. In furtherance of this mission, the Society recognizes and networks Catholic schools and colleges that are committed to core Catholic beliefs and principles.

Christian Medical & Dental Associations ("CMDA") educates, encourages, and equips Christian healthcare professionals to glorify God in part by providing resources, networking opportunities, and a public voice for Christian healthcare professionals and students. It also operates CMDA Student Life, which is a network of campus chapters helping students live out the character of Christ on their campuses. CMDA has more than 300 campus ministries, representing 90 percent of the nation's medical and dental schools.

Amici's interest is in ensuring that faith-based student groups and educational institutions are treated equally to secular student groups and educational institutions.

They seek to ensure that government educational policies and actions are neutral and do not disfavor—or express an open hostility to—religious beliefs.[*]

INTRODUCTION

The panel majority correctly held that the San Jose Unified School District's selective enforcement of its nondiscrimination policy against the Fellowship of Christian Athletes likely violates the First Amendment. Despite granting official recognition to *secular* student groups that limited membership based on discriminatory criteria, the School District refused to recognize *religious* groups that limited leadership positions to those who shared their core beliefs. The School District's policy also allowed discretion to grant individualized exemptions, but the School District failed to grant such an exemption here. The panel correctly applied strict scrutiny and held the policy and its selective enforcement was highly likely to be unconstitutional. The *en banc* Court should do the same.

The *en banc* Court should also recognize that *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011), is no longer good law. It has been abrogated by recent Supreme Court precedent—including in appeals from this Court's

[*] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* state that no counsel for any party authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and that no person—other than *Amici* or their counsel—contributed money that was intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

decisions—and this Court should formally overrule it. *See Miller v. Gammie*, 335 F.3d 889, 893, 900 (9th Cir. 2003) (en banc) (overruling circuit precedent *en banc* because it was "clearly irreconcilable with the reasoning or theory" of "intervening Supreme Court authority").

Alpha Delta's approach to the Free Speech Clause has been superseded by the Supreme Court's decision in *Reed v. Town of Gilbert, Arizona*, 576 U.S. 155 (2015). The *Alpha Delta* court declined to apply strict scrutiny because it determined the nondiscrimination policy did not *intend* to suppress a particular viewpoint. *See* 648 F.3d at 801. But in *Reed*, the Supreme Court reversed this Court on that very point, holding instead that courts must first determine whether a policy is content neutral on its face before looking to the purpose behind the policy. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." 576 U.S. at 165 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

Alpha Delta's analysis under the Free Exercise Clause is similarly obsolete. This Court in *Alpha Delta* asked whether the nondiscrimination policy "target[ed] religious belief or conduct." 648 F.3d at 804. But in more recent cases, which this Court has described as marking a "seismic shift in Free Exercise law" (*Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1232 (9th Cir. 2020)), the Supreme

Court has rejected that approach. For instance, in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court (reversing this Court) held that government policies that treat "*any* comparable secular activity more favorably than religious exercise" are not "neutral and generally applicable." *Id.* at 1296. And in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Court struck down a government's refusal to exercise its discretion to grant an individualized exemption to a religious group. *Tandon* and *Fulton* make clear the Free Exercise Clause is not violated *only* when the government "targets" religious belief or conduct; favoring secular activity over religious activity triggers strict scrutiny as well.

The School District's enforcement of its policy is subject to (and fails) strict scrutiny, and this Court should overrule *Alpha Delta*'s suggestion to the contrary.

ARGUMENT

I. *Alpha Delta*'s Failure to Apply Strict Scrutiny under the Free Speech Clause Is Incompatible with the Supreme Court's Decision in *Reed*

A law that regulates speech in a manner that is not content-neutral on its face is subject to strict scrutiny review under the First Amendment, regardless of the policy's purpose. The court in *Alpha Delta* skipped the required facial analysis and declined to apply strict scrutiny, but recent Supreme Court decisions have rejected that approach.

Alpha Delta involved a First Amendment challenge to San Diego State University's ("SDSU") nondiscrimination policy. 648 F.3d at 795. The SDSU

policy prohibited student groups from limiting their membership based on "race, religion, national origin, ethnicity, color, age, gender, marital status, citizenship, sexual orientation, or disability." *Id.* at 796. Student groups that violated SDSU's nondiscrimination policy were denied official recognition and its associated benefits, such as "university funding, use of San Diego State's name and logo, access to campus office space and meeting rooms, free publicity in school publications, and participation in various special university events." *Id.* at 795.

A Christian sorority (Alpha Delta Chi), a Christian fraternity, and various individual officers of each group challenged SDSU's nondiscrimination policy under the Free Speech and Free Exercise Clauses of the First Amendment. *Id.* Both groups were denied official recognition because they required members to espouse certain Christian beliefs. *Id.* at 796. In particular, the Christian groups argued SDSU's policy was discriminatory on its face because it prohibited membership restrictions based on religious beliefs but allowed the same restrictions if they were based on secular beliefs. *Id.* at 800. For example, the policy permitted secular groups like the Immigrant Rights Coalition, San Diego Socialists, and Hispanic Business Student Association to restrict membership to students who shared the groups' core beliefs. *Id.* at 800–01. The nondiscrimination policy thus "allow[ed] these secular groups to discriminate on the basis of belief, while prohibiting Plaintiffs from doing so on the basis of their religious beliefs." *Id.* at 801.

The *Alpha Delta* court nonetheless declined to apply strict scrutiny. Although the court found the Plaintiffs' argument "compelling" that the nondiscrimination policy burdened student groups who wished to limit membership to those with shared religious beliefs, it still upheld the policy by looking to its purpose. *Id.* at 801. Because SDSU did not enact the nondiscrimination policy "for the *purpose* of suppressing Plaintiffs' viewpoint," the court held that the policy was viewpoint neutral and did not violate the First Amendment. *Id.* at 801, 803.

This is no longer good law. Since *Alpha Delta*, the Supreme Court has explicitly reversed this Court on this point, holding that government policies that are content-based restrictions on their face are subject to strict scrutiny regardless of "the government's justifications or purposes." *Reed*, 576 U.S. at 164–65.

Reed v. Town of Gilbert involved a sign code that treated outdoor signs providing directions to "religious, charitable, community service, education, or other similar non-profit" events less favorably than signs with political content. *Id.* at 160. Over Judge Watford's dissent (*see Reed v. Town of Gilbert, Ariz.*, 707 F.3d 1057, 1079 (9th Cir. 2013), *rev'd and remanded*, 576 U.S. 155 (2015)), this Court applied the same approach as it did in *Alpha Delta* and held that the sign code was content neutral because the government's "justifications for regulating temporary directional signs were 'unrelated to the content of the sign.'" 576 U.S. at 165. But the Supreme Court reversed, holding that "[a] law that is content based on its face is subject to

strict scrutiny *regardless* of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* (emphasis added). Because the sign code, as written, applied different rules to outdoor signs based on the messages they conveyed (e.g., ideological messages vs. political or other non-profit messages), the Supreme Court ruled that it was a content-based restriction that triggered strict scrutiny. *Id.* at 171.

Reed makes clear that courts must consider "whether a law is content neutral on its face *before* turning to the law's justification or purpose." *Id.* at 166. "[B]enign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech" does not save a government policy that is "content based on its face." *Id*. at 165 (internal quotation marks omitted).

Alpha Delta skipped this "crucial first step in the content-neutrality analysis" (*Reed*, 576 U.S. at 165), ruling instead that facial discrimination was not enough to trigger strict scrutiny absent "evidence that [SDSU] implemented its nondiscrimination policy for the *purpose* of suppressing Plaintiffs' viewpoint, or indeed of restricting any sort of expression at all" (*Alpha Delta*, 648 F.3d at 801). That is the same error that prompted the Supreme Court to reverse in *Reed*.

Other circuits have recognized *Reed* abrogates prior case law that looked to a policy's purpose when determining content neutrality, and have corrected circuit precedent. *See*, *e.g.*, *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) ("Our

earlier cases held that, when conducting the content-neutrality inquiry, '[t]he government's purpose is the controlling consideration.' But *Reed* has made clear that, at the first step, the government's justification or purpose in enacting the law is irrelevant.") (quoting *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 555 (4th Cir. 2013)) (citations omitted); *Pursuing Am.'s Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 509 (D.C. Cir. 2016) ("To the extent our decision in *Republican National Committee* looked to the purpose of a law that regulated content on its face, *Reed* forbids us from following *Republican National Committee*'s course here. Because the plain terms of section 102.14 prohibit speech based on the message conveyed, the regulation is content based regardless of its purpose."). And some panels of this Court have followed *Reed*'s instruction. *E.g.*, *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1226 (9th Cir. 2019); *Boyer v. City of Simi Valley*, 978 F.3d 618, 621–22 (9th Cir. 2020)),

But because *Alpha Delta* has not been formally overruled, it continues to be cited by panels in this Circuit. *E.g.*, *Eagle Point Educ. Ass'n/SOBC/OEA v. Jackson Cnty. Sch. Dist. No. 9*, 880 F.3d 1097, 1106–07 (9th Cir. 2018); *TGP Commc'ns, LLC v. Sellers*, 2022 WL 17484331, at *4 (9th Cir. Dec. 5, 2022). The School District here continues to rely heavily on *Alpha Delta* in arguing for a more relaxed standard of scrutiny (*see*, *e.g.*, ECF Nos. 21, 59, 93), without substantively engaging with *Reed*'s instruction that a discriminatory purpose for a given policy is not

required to run afoul of the First Amendment. The *en banc* Court should rule expressly that *Alpha Delta* is no longer good law.

II. *Alpha Delta*'s Free Exercise Analysis Contradicts Recent Supreme Court Decisions

Alpha Delta's analysis of SDSU's nondiscrimination policy also runs afoul of the Supreme Court's latest Free Exercise decisions.

In *Alpha Delta*, this Court declined to apply strict scrutiny under the Free Exercise Clause because it found SDSU's nondiscrimination policy did not "target religious belief or conduct" or "impose special disabilities on Plaintiffs or other religious groups." 648 F.3d at 804. The Court reasoned that SDSU's nondiscrimination policy was "a rule of general application" and that "[a]ny burden on religion [was] incidental to the general application of the policy." *Id.* at 804. Here again, the *Alpha Delta* court's approach has been expressly rejected in recent Supreme Court decisions.

First, the way *Alpha Delta* analyzed whether the SDSU nondiscrimination policy was "generally applicable" was rejected by the Supreme Court in *Tandon*.

Tandon involved a First Amendment challenge to California's COVID restrictions for indoor and outdoor gatherings. At the time, California treated some secular activities, like "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants" more favorably than "at-home religious exercise," even though these secular activities

posed a similar risk to the government's asserted interest, which was preventing the spread of COVID. 141 S. Ct. at 1297. This Court upheld the restrictions on the basis that these secular activities were not comparable to at-home religious exercise. *Id.* But the Supreme Court reversed, holding that the government cannot treat the secular activity more favorably than religious exercise. *See id.* at 1296.

SDSU's nondiscrimination policy in *Alpha Delta* would unquestionably be subject to strict scrutiny under *Tandon*. The policy "allow[ed] secular belief-based discrimination while prohibiting religious belief-based discrimination"—even though secular belief-based discrimination equally undermined the school's asserted interest of ensuring that the school's resources were "open to all interested students without regard to special protected classifications." *Alpha Delta,* 648 F.3d at 800–01.

The same is also true in this case. The School District does not dispute it allows student groups to exclude leaders and members on any grounds the School District officials deem nondiscriminatory based on their own "common sense." Even the Associated Student Body group at the School District's Pioneer High School, which is responsible for enforcing the School District's policies against all other clubs, requires officers and student leaders to have a certain threshold GPA and commit to be a "role model and positive example at all times for the student body," among other things. *See ASB Candidate Application*, https://tinyurl.com/

5e6nxxfp; *Leadership Application*, https://tinyurl.com/2cs7vsm6 (last visited Feb. 13, 2023); *Incoming Freshman Leadership Application*, https://tinyurl.com/289z7vjs (last visited Feb. 13, 2023); *Class Officer Application*, https://tinyurl.com/2p93zzta (last visited Feb. 13, 2023). Under *Tandon*, the School District may not allow these student groups to exclude students based on secular criteria and refuse to allow religious groups from doing the same based on their faith.

Second, *Alpha Delta* failed to consider the significance of SDSU's ability to grant exemptions to the nondiscrimination policy. The Supreme Court made clear in *Fulton* a policy that burdens religion, even "incidentally," runs afoul of the Free Exercise Clause where it "invite[s] the government to consider the particular reasons" for "individualized exemptions." 141 S. Ct. at 1876, 1877.

Fulton addressed a nondiscrimination provision in a contract between the City of Philadelphia and a Catholic foster care agency, which "incorporate[d] a system of individual exemptions" that was "made available ... at the 'sole discretion' of the Commissioner [of the Department of Human Services]." *Id.* at 1878. The Court held this policy was not "generally applicable" because it "invite[d] the government to decide which reasons for not complying with the policy are worthy of solicitude ... at the Commissioner's 'sole discretion.'" *Id.* at 1879 (internal quotation marks omitted). Having the authority to grant exemptions to the nondiscrimination

provision, the City was required to satisfy strict scrutiny before it could deny an exemption to the religious organization. *Id.* at 1881–82.

Alpha Delta's contrary approach to individualized exemptions is, again, no longer good law. The *Alpha Delta* court acknowledged SDSU exempted other organizations from complying with its nondiscrimination policy, yet the court still found that the policy on its face was a "rule of general application" and remanded the case only to determine whether it was applied in a discriminatory manner. *See* 648 F.3d at 803–05. The Supreme Court rejected that standard in *Fulton*; having the authority to grant the exemption and withholding it from the religious organization must itself satisfy strict scrutiny. 141 S. Ct. at 1881–82.

Third, *Alpha Delta* failed to consider that the government may not withhold a "generally available benefit" to student groups "solely because of their religious character." *Carson v. Makin*, 142 S. Ct. 1987, 1997 (2022) (citation omitted).

In upholding SDSU's nondiscrimination policy, the *Alpha Delta* court found it significant that SDSU had denied only *certain* benefits to non-recognized groups, while still allowing them to "use campus facilities for meetings, to set up tables and displays in public areas, and to distribute literature." *Alpha Delta,* 648 F.3d at 799. But "[t]he Free Exercise Clause of the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions,'" and the Supreme Court has "repeatedly held that a State violates the Free Exercise

Clause when it excludes religious observers from otherwise available public benefits." *Carson*, 142 S. Ct. at 1996.

Thus, although SDSU allowed Christian student groups to have access to *some* school resources, denying them official recognition and its associated benefits due to the groups' religious nature still violated the Free Exercise Clause. The Supreme Court in several recent decisions has held that the government violates the Free Exercise Clause by withholding a publicly available benefit solely because of the recipient's religious nature. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2255 (2020). *Alpha Delta*'s contrary holding is no longer good law, and the *en banc* Court should overrule it.

CONCLUSION

This Court should reverse the district court's denial of Plaintiffs' motion for a preliminary injunction. In doing so, the *en banc* Court should expressly overrule *Alpha Delta*.

Dated: February 21, 2023

Respectfully submitted,

/s/ Blaine H. Evanson

BLAINE H. EVANSON
GIBSON, DUNN & CRUTCHER LLP
3161 MICHELSON DRIVE
IRVINE, CA 92612-4412
(949) 451-3800
bevanson@gibsondunn.com

ATTORNEYS FOR AMICI CURIAE

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief is proportionately spaced, has a typeface of 14 points, uses font type Times New Roman, and complies with the word count limitations set forth in Circuit Rule 29-2(c)(3). This brief has 3,048 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32, according to the word count feature of Microsoft Word used to generate this brief.

Dated: February 21, 2023

/s/ Blaine H. Evanson
Blaine H. Evanson

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing amicus brief in support of Plaintiffs-Appellants with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the Court's CM/ECF system on February 21, 2023. I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

Dated: February 21, 2023

/s/ Blaine H. Evanson

Blaine H. Evanson